LAW,

Or a Diſcourſe thereof,

IN

FOUR BOOKS.

Written in French by Sir

HEN: FINCH Knight,

His Majeſties Serjeant at

LAW.

And done into Engliſh by the ſame Author.

Leges nobis charæ eſſe debent, Non propter literas, ſed propter earum rerum, quibus deſcriptum eſt, utilitatem, & eorum, qui ſcripſerunt, ſapientiam. Cic.

LONDON,

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for a year. This is a leaſe for a year.

And therefore

95. A thing that ſhould not be done, to be as if it were not done.

18. El. Dy. 36. One grants a rent charge, without ſaying *pro ſe & hæredibus*, and dieth. The grantee brings a Writ of annuity againſt the heir, and hath judgment to recover: yet he may diſtrein afterwards: for the heir was never chargeable. So that upon the matter, it makes no election.

20 El. Dy. 362. A man makes a leaſe for years of a houſe with certain implements, reſerving a rent, the Executors after the Teſtators death, receive the rent, yet it is no aſſets in their hands: for the whole rent belongeth to the heir.

96. So of a thing done in a time that it ſhould not.

1. E. 6. Br. 18. A man ſeiſed in fee, lets for ten years, & after ſelleth the land, and taketh it back to him and his wife, & then the husband and wife let it for twenty years, reſerving a rent: the husband dieth, the wife accepts this rent during the firſt ten years. By this the ſecond leaſe is not affirmed, for the acceptance of a rent before the leaſe begi nneth, and ſo before any rent be due, is no acceptance at all.

21 El. 563. A matter pleaded or diſcloſed out of time and courſe, is as if it were not pleaded at all.

all. As if one bring an action of debt upon an obligation, & count that the defendant was of full age at the time, the defendant shall not travers this; but only say he was within age, and the traverse must come of the plaintiffes part.

To the circumstance of time, these two rules pertain.

Priority of time is imagined in things.

97. Done together.

One deviseth a term for years to his son, and that the wife shall have it during the sons minority. This is first a devise to his wife, and after to the son when he cometh of full age. 21 *El.* 540.

One grants his reversion of lands, and by the same deed granteth a rent out of these lands to another, and delivereth the deed to both at one self same time. Yet it shall inure first as a grant of the rent to the one, and then as a grant of the reversion to the other.

98. Happening in an instant.

A mesualty discends to the Tenant of the land, though the mesualty be at the same instant extinct, yet the tenant shall pay relief if he be of full age, or be in ward if he be within age (*viz.*) where it is holden by Knights service. 11. *H.* 7. 11.

Land is given to A. for the life of B. the remain-

 7 *H.* 4. 6.

remainder to the right heirs of B. A. dieth, the remainder takes effect before any occupant.

9. E. 4. 21. A man exchangeth land for a rent charge out of the same land: This is good enough though they be in an instant (whereby the rent should be drowned in the land) for the law accounteth the exchange of the land to be first perfected.

99. Things relating to a time long before, be as if they were done immediatly from that time.

Li. 91. When the wife is endowed by the heir of her husband's lands, she shall be said to be in immediatly from the husband. And therefore if the husband were a disseisor, & the heir in by discent, yet the disseisee may enter upon the wife.

36. H. 6. 7. Goods taken out of the possession of an executor who refuseth, and administration is committed to I. S. I. S. may have an action of trespass, supposing they were taken out of his possession: for he shall be said an Administrator from the very time of the death of the intestate.

These rules of common reason do many times crosse and encounter one another, which is the greatest difficulty that we find in the arguing of our cases. But to help this the general ground is according to the former rule ( ) that

100. Thos

100. **Thoſe prevail that carry the more excellent and perfect reaſon with them.**

Tenant for life makes a leaſe for life without naming whoſe life, this ſhall be intended for his own life (Rule 74.) for elſe it were a wrong. But if a tenant in tail make ſuch a leaſe for life, this is a diſcontinuance, and for life of the grantee (Rule 86) for it is ſtrongeſt againſt the grantor, and moſt beneficial for the grantee. *Lit.* 110. *b.* *Lit.* 140. *b.*

Things executed where the husband is ſeiſed in the right of his wife, ſhall not be avoided by divorce: as waſt committed, receit of rent, wards, or preſentments that have fallen, gifts made of the wives goods, &c. Rule 39. But otherwiſe it is in matters of inheritance, as if the husband diſcontinue and charge the wives lands, releaſe or manumiſe villains, &c. Rule 30. 32. *H.* 8. *Br. Ber.* 18.

A feoffment is made with warranty, the feoffee dieth having iſſue two daughters, who make partition of the land. This warranty ſhall be divided notwithſtanding the partition which is their own act, and therefore not ſo much favoured, Rule 46. For the land cometh to them originally by act in law, that is by diſcent, Rule 5. 28. *E.* 3. 20. *b.* *Br. gar.* 27.

If the Chancellor die before his ſervants priviledge diſcuſſed in bank, yet it ſhall be allowed, notwithſtanding the cauſe of his priviledge now be gone. (contrary to Rule 3.) But the reaſon is, for that once he had cauſe: and the act of a third Perſon (that is to ſay the Court) ſhall not prejudice him 35. *H.* 6. 3.

where no folly was in himself. Rule 63.

9 El. Dy. 264. b. The husband possessed of a term in the right of his wife, maketh a lease of parcel, rendering a rent, the wife shal have the residue of the term, but not the rent, Rule 9. notwithstanding it come in lieu of the land, Rule 93. and be as it were an accessary unto it, Rule 25.

Things may be done in the night time, notwithstanding, Rule 49. where there is a kind of necessity of doing them, then, Rule 44. as arbitrement made and delivered in writing, the last day after the Sun set, is good enough: for judgments and arbitrements require long advice.

11. H. 7. 5. So may goods be distreined in the night time for dammage feasant.

If one of the Chapter infeoffe Dean and Chapter, by that he himself shall take by his own livery, Rule 18. notwithstanding Rule 20.

Park. 41.

13. H. 8. 15. A man may do an act to himself, notwithstanding Rule 20. where the law cannot do otherwise, Rule 18. as a feme tenant in socage may endow her self, an executor pay himself, &c. Counts and declarations must be certain, Rule 66. yet things which contain a necessary implication are good enough, Rule 94. As in an *ejectione firmæ*, & count of a lease made by tenant for life, it sufficeth to say, that the lessor is yet seised, without alledging his life expressly. In an information upon the Statute of usury, and count that the defendant took *per viam, & medium*

14 El. Dy. 347.

medium corrupte mutationis, where it should be *accomodationis*, yet it is good enough.

Corporal service as suit of Court &c. cannot be done by another, Rule 14. notwithstanding Rule 92. 7 H. 4. 9.

Matters of trust or authority, &c. cannot be granted over; because being strictly taken, they are esteemed to belong to the person, and therefore guided by Rule 15. Yet an office of skill and diligence to one and his heirs, may be granted over. So upon a Letter of Attorney to deliver seisin to A. he may deliver it to the Attorney of A. for that upon the matter is a possession delivered to himself, Rule 21. 12 El. 379. b.

Tenant in taile makes a feoffment with warrantie, and leaveth to descend a reversion in fee-simple expectant upon an estate taile, which I. S. hath; this is no assets, for it may be tolled by a common recoverie (and therefore the law esteemeth it as if it were so.) But it seemeth otherwise of a reversion depending upon an estate taile of land which the issue himself hath, for it were the folly of the issue in taile to cut it off, Rule 70. 25 El. Earl of Lin. case.

CHAP.

CHAP. VI.

Of Laws Positive.

AND so much of Laws Native.

The Law of nature and of reason, or the Law of reason primarie & secundarie, with the rules framed and collected thereupon. Which three are as the Sun and the Moon and the Seven Stars, to give light to all the positive laws of the world.

Positive are laws framed by their light, and from thence come the grounds and maximes of all Common Law: for that which we call Common Law, is not a word new and strange, or barbarous, and proper to our selves, and tho law that we profess, as some unlearnedly would have it, but the right term for all other Laws. So *Euripides* mentioneth the Common Laws of *Greece*: and *Plato* doth define it, speaking of the reasoning facultie, saith he which being taken up by the common consent of a Country, is called Law, and anon he nameth it

the golden and sacred rule of reason, which we

we call Common Law. The place is very notable, it openeth the original and first beginning of the Common Law, it sheweth the antiquity of the name, in effect all one with that which since and by a later name is called *Jus civile* (*quod quisque populi ipse sibi jus constituit*, as *Justinian* speaketh) it teacheth Common Law to be nothing else but common reason: but what reason? not that which every one doth frame unto himself; but refined reason, *Quæ sum adoleverit atque perfecta est nominatur rite sapientia*, as *Tully* saith, and as *Plato* there hath it, when it cometh to be *opinio* or *decretum*. How?

generally received by the consent of all.

Therefore Laws positive, which are directly contrary to the former, lose their force, and are no Laws at all.

As those which are contrary to the Law of nature. Such was that of the Egyptians, to turn women to Merchandize, and commonwealth affairs, and men to keep within doors. And of the Thracians, which accounted idleness an honest thing, and stealing very commendable. So if it were made a law, that men might commit adultery, forge false deeds, &c. And this is manifest unto all men. But because the law of reason is known only to such as are able to judge aright, and that but imperfectly (as

before

before was ſhewed) therefore here the caſe is harder, what laws may be ſaid agreeable and what repugnant thereunto. Only in general (which is ſufficient for this place and purpoſe) it is truly ſaid, and all men muſt agree, that laws in deed repugnant to the law of reaſon, are alwell void, as thoſe that croſs the law of nature.

Poſitive Laws are ſundry and divers, according to the ſeveral and divers conſtitutions of particular places and countrys.

Such among the Jews were their Politicals delivered by Moſes, which ſo far as they be poſſitive, bind us not unto them. Such were the antient law of the Grecians, the xij. tables, and civil laws of the Romans, and **Such are the Common Laws of** England. And almoſt ſo many people ſo many Laws. And as thoſe Laws are divers one from another, ſo one & the ſelf ſame laws may be altered and changed in themſelves, ſo long as no alteration is permitted againſt the two main Laws of Nature and Reaſon.

The

The Second Book of LAW.

CHAP. I.

Of the Common Law of England, whereof the parts of the Realm, and of the persons in it. Of Custom and Prerogative.

THE Common Law of England is a Law used time out of mind, or by prescription throughout the Realm. For to plead that there is a Custom among Merchants throughout the Realm, to assigne Licences over, is not good, inasmuch as that which is currant throughout the Realm, is Common Law, not Custome. And under the name of the Realm of England, it is plaine that (a) Scotland

Litt. 38. *That prescription is a usage time out of mind.*

(a) 8 R. 2. *cont. claim.* 13.

(b) 2. Mar. 29.
(c) 20. H. 68. *A fine with Proclamations according to* 4. *H.* 7. *shall not bar one in* Ireland.
(d) 22. *ass. pl.* 93. *The Statute* 1. *R.* 2. *c.* 5. *proveth the Common Law to be so.*
(e) St. *Hen. Constables. Co.* 107.

and Wales (*b*) much less (*c*) Ireland, are not included. Neither is the main Sea, that is to say, beneath the low water mark, parcell of the Realm; for there the Admirals jurisdiction (which hath nothing to do of things within the Realm) doth only meddle and not the Common Law. But between the high water mark and the low water mark, where by ordinary and natural course, the Sea ebbs and flowes: the Common Law and the Admiralty have *divisum imperium*, one upon the water when it is full Sea, the other upon the land, when it is an ebb.

Statutes 27. H. 8. cap. 26. Incorporateth VVales into England.

The whole Realm is divided into several Counties or Shires. And those again into certain Vills or Towns; in many of which, as also in divers Mannors whereof it cometh to speak afterwards.

(a) 12. H. 7. 18 *Fineux.*
(b) *Lit. consuetudo ex ratione nabili causa usitata privat. Communem legem.*
(c) *Lit.* 46. & 58.
(d) 8. *H.* 3. *prescript.* 60. 5. E. 4. 30.

There be special usuages time out of mind, altering the common law which we call Customs.

As in Kent, the Custom of Gavelkind for all the heirs males to inherit alike, and the wife not to lose her dower, nor the heir his Land, though the husband or ancestor be hanged for Felony.

Lit. 37.

In London, if the Debtor be fugitive, that the Creditor before the day of payment may arrest him to find better suretie.

In

In many Boroughs the youngeſt Son to inherit all. The wife to have for her dower all her husbands lands; the lands there to be deviſible by will.

A County is a part of the Realm, entirely governed by one Sheriff under the King, but all Subject to the general government of the Realm. And therefore every County is as it were, an entire body of it ſelf, ſo that upon a feoffement of lands in many Towns in one County, livery of ſeiſin made in one parcel in any one of the Towns in the name of all, ſufficeth for all the lands in all the other Towns within the ſame County. But upon a feoffement of lands in divers Counties, there muſt be livery of ſeiſin in every County.

Alſo an exchange of lands in one and the ſame County is good by paroll; but in divers it muſt be by deed indented. *Lit.* 13.

A man is driven to take notice of many things done in the ſame County, where he is, but not in another. As if an action of debt be brought againſt an Executor, he may pay the aſſets which he hath in his hands to any other to whom the Teſtator ſtood indebted, till notice of the action brought againſt him, if the ſuit be in an other County, but not if it be in the ſame County, for there he muſt take notice of the action at his peril. 2. H. 4. 11.

An Enqueſt alſo ſhall not take notice of things done in another County; but becauſe all are under one general government,

ment, therefore things done in several Shires shall be tried by a joynder of Counties, the Jury that trieth the principal may take notice of a thing accessary, though it be in another Shire. As in an
21. H. 6. 51. action of Trespass, if the defendant plead an arbitrement in a Forraigne county, and issue be taken upon it, and found for the Plantiffe: the Jury there must access da-
9 E. 4. 40. mages for the Trespass done in the other County.

Likewise in an action of debt against an Executor, who pleadeth, *ne unque administ.* and giveth in evidence, a deed of gift made unto him by the Testator in his life time in another County, the Jury must find it upon pain of attaint. So of a release pleaded to be made in another County in a writ of right.

There be in all thirty nine Shires, Kent Sussex, Surrey, &c.

18. H. 6. 13. **A Town is a precinct anciently containing ten families,** whereupon in some Countrys they are called Tythings, **within one of which Tythings every man must be dwelling, and find sureties for his good behavior,** else he that taketh him into his house is to be amerced in the Leet.

Divers of these Towns have Hamlets in them some special places there be in every County, out of any Town or Hamlet.

The persons within the realm are

to

to be considered either as one entire body, or as particular persons.

As one intire body it consisteth of the K. & common persons his subjects.

The King is the head of the Commonwealth, immediate under God. 1. H. 7. 10.

And therefore carrying Gods stamp & mark among men, and being, as one may say, a God upon earth, as God is a King in Heaven: hath a shadow of the excellencies that are in God, in a similitudinary sort given him: Gods excelleneies & honour standeth partly in things incommunicable unto other, partly in such as after a sort he maketh his creatures partakers of both: which the King is said to have some in truth, other by fiction, all by similitude from the divine perfection.

The first thing in God, and most proper to his sacred Majesty, is, the infiniteness of his nature; who, as the philosoper elegantly saith, only is that Circle, *cujus centrum est ubiq; peripheria nusquam.* So say our books, that the King in a manner is every where, and present in all his Courts.

In a writ of error upon a false Judgment given for the King, no *Scire facias* shall go forth *ad audiendum errores*, for the King is alwaies present in court, & that is the cause that the form of entry in all suits for the King is *Henricus Hobart miles, Attorniatus domini Regis generalis qui pro domino* F.N.B 21. b.

Rege sequit' ven' hic in Cur. &c. and doth not say, *Dominus Rex per Henricum Hobart Attornatum suum*, &c. And therefore it is also, that the King cannot be *non suit*, that all acts of Parliament, which concern the King or General, and the Court must take notice without pleading of them, for he is in all, and all have their part in him.

25. H. 6. Br. nonsuite 68. 3. El. 231.

A second thing proper unto God, is the divine perfection. In the King nothing imperfect can be thought, no (a) negligence, or laches, no folly, no infamy, no stain or corruption of bloud. So as (b) mortage avoideth not his grant, though it be of lands which he hath in his natural capacity.

(a) 35. H. 6. 26

(b) 3. Eliz. 213

(c) 1. H. 7. 4.

By (c) his taking of the Imperial Crown upon him, all attainder of his person are purged *ipso facto*.

The excellencies which God bestoweth upon his creatures (for I will touch no more but those that the books of our Law do speak of, and such as are leading rules to the cases that you shall find there argued & debated) are first Majesty, Soveraignty, Power, Perpetuity, and then that noble complement of Justice and truth.

Bract. lib. 1. cap. 8.

The Law, saith *Bracton*, gives unto the King *Dominationem & Potestatem*.

2 H. 7. grants 33.

He hath absolute power over all: for by a clause of *non obstante* he may dispense with a Statute Law, and that if he recite the Statute) though the Statute say, such dispensations shall be meerly void.

The King cannot take, he cannot part from

from any thing but by matter of record. And that is for the Majesty of his person. His supream Soveraignty makes him immediate under God. *Omnis quidem sub eo & ipse sub nullo nisi tantum sub Deo*, saith *Bract.* It makes all lands to be holden of him, every surrender unto him to be good, no action to lie against him, for who shall command the King? *Bract. ibid.* (a) *Stam. prær.* 73 1. (b) 7. *E.* 4. 17. (c) 50. *Ass. pl.* 1 18. *Eliz.* 498.

Nay, Acts of Parliament do not bind him, unless they concern the Commonwealth, or he be specially named. Neither can the King be Joyntenant with any, though it be of land, or other things that he hath in his body natural: For none can be equal with him. And therefore if two purchase land to them and their heirs, and one be made King, they are now no more Joyntenants, but tenants in Common. Lastly for perpetuity, the King never dieth, but in Law it is said the demise of the King, and a Gift unto the King, without saying more, trencheth to his successors. 4 *E.* 4. 21. 1. *El.* 223. & 240. 3. *Eliz.* 239. 4 *El.* 234.

To come to the other two; the power of God is alwaies joyned with Justice & truth: for to do wrong, to deal untruly, is not omnipotency, but a thing of weakness and impotency. So it is with the King, he cannot be a (*a*) disseisor, he can be no wrongdoer: for he is all Justice, he shall never be (*b*) estopped. Judgment final in a Writ of right, doth not conclude him, for he is all truth, *Veritas & Justicia*, saith *Bract.* *Circa solium ejus.* They are the two supporters 4. *Mart.* 177. *Potentia injuriæ est impotentia naturæ.* (a) 4. *E.* 4. 25. (b) *F. N. B.* 143. *b.* (c) 20. *E.* 3. *Dr.* 15. *F. N. B.* 31. *D.*

ters that do uphold his Crown.

Therefore also he hath a prerogative in all things that are not injurious to the Subject. As he may create Corporations, Dean and Chapter, Major and Commonalty, *&c.* make Denisens and it remaineth good, though he be declared an usurper after (but no continuance in England can make a Denisen, though it be from his childhood, and he sworn to the King in Leets) he may reserve rent unto a stranger, grant a condition or thing in action, give in fee simple, upon condition not to alien, except out of his grant, things incident, as Courts and perquisits of Court upon the grant of a Mannor, sue in what Court he will: as to have a *quare impedit* or Writ of Escheat, returnable in the Kings Bench, or a *quare incumbravit* there, though the record of the Recovery be in the common place. He may alledge in his Court or plea, double matter, or as many matters as he will (and the party must answer to them all, and then the King shall take issue upon any one at his pleasure. He may wave his issue, and demur in Law, and contrariwise, so it be the same term, but not in another term for so he might do it infinitly. He may challenge a Juror without shewing cause, or the array, because the Sheriff that made it, was cosin to the party. But no challenge shal be of a Juror against him. He is not bound to make a demand (or tender) where a lease is made, reserving a rent

with

with a clauſe of re-entry: hath the property of all goods that are *in nullius bonis*, ſhall have the Tythes of Forreſts and places out of any pariſh, take advantage of other mens places, as to have a Writ to the Biſhop, if title appear for him, though he be a ſtranger to the Action, all the Daughters and Heirs (where the anceſtor held in chief) muſt do homage to him: where (if they hold of a common perſon) the eldeſt only muſt do it where he is to have a benefit, a man may plead more pleas than once, *par* darreine continuance, as outlawry in an action of debt, *&c.* And many prerogatives more he hath, which in their ſeveral places ſhall come more properly to be conſidered.

But in them all it muſt be remembred, That the Kings prerogative ſtretcheth not to the doing of any wrong; for it groweth wholly from the reaſon of the common Law, & is as it were a finger of that hand, although ſo much differing in faſhion (as the head and the body can never be of one proportion) that if you ſet them in parallels together, you ſhall find it to be law almoſt in every caſe of the King, that is law in no caſe of a ſubject. And yet for all that, they are not two, but one law. Only the Common Law is as the *primum mobile* which draws all the Planets in their contrary courſe. 12. H. 7. 19.

In regard of the King, the Queen his wife is participant of divers

prerogatives above other women.

3 E. 231. As in an act of Parliament making all gifts and grants unto her, or by her (whether between the King and her, or between her and any other person) to be of the same effect, as if it were between other subjects, without any benefit thereby to come unto the King, need not be pleaded, but the Court and all the Realm must take knowledge of it, because she is a publick person, in whom all the subjects of the Realm have interest, being the Kings wife, as they have in the King himself. Likewise she may have in her self the possession of personal things during her life, so as she may (*a*) have an action in her own name alone, take lands and other possessions from the (b) 3. H. 7. 14. King by Charter (*b*) make leases, feofments &c. which shall be good during her life, but afterward the King shall have them: And divers other prerogatives she hath, which follow in their place.

(a) 49. ass. pl. 8.

His Subjects are the members of the Commonwealth, and are Barons and Commons.

Barons we call the Peers of the Realm. For every Duke & Earl is Peer of the Realm, because he hath a Barony belonging unto him. Otherwise Duke and Earl are but names (*a*) of dignity and of honour only, and (*b*) parcel of ones name.

(a) 14. H. 4. 7.
(b) 21. E. 484. 8. H. 6. 10.

So

So as in every action which he bringeth, or is brought against him, he must be named Earl or Duke, as he is, else the Writ shall abate. But the name of Baron is the name of ones place & calling, which shall not be expressed in any Writ. And where addition is necessary, as by the Statute of 1 *H.* 5. yet he shall never be impleaded by the name of Baron, for it is not any dignity, but must be named Knight if he be one, or Esquire if he be no Knight. And touching Bishops, who enjoy the name of Lords of the Parliament, they have the same in respect of ancient Baronies annexed to their dignity. 32. *H.* 6 29. *Stamp. prer.* 154. 7. *H.* 8. *Cr.* 184. *Hunnes case by all the Justices of England.*

All the rest are Commons.

The particular persons are natural persons, or bodies politick. The natural person is every man.

A body politick is a body in fiction of Law that endureth in perpetual succession. And such is the King alone, and by himself considered: and a Parson the Law calleth him the Rector of a Church, for the King hath two capacities, a body natural (wherein he may inherit from any of his ancestors, or purchase to him and his heirs, and retain the same, notwithstanding he be removed from his estate Royal) and a body politick, wherein he may purchase to him & his heirs Kings of England, or to him 14. *H.* 8 3. *Fitz.* 4. *El.* 234.

and his Succeſſors. So a Parſon is a Cor-
poration by the Common Law, and hath
two capacities, one to take to him and his
heirs, and the other to him and his Suc-
ceſſors. And therein he is ſeiſed *in Jure Eccleſiæ*.

And if I. S. be Parſon of D. and land be
given to I.S. Parſon, and his ſucceſſors, &
to I.S. Clerk; and his heirs; he is a tenant
in Common with himſelf.

**The parſon in regard of his con-
tinual attendance upon that ſacred
function is freed from all perſonal
charges that may hinder him in his
calling.** For ſuch a one ſhall not be
choſen Bayliffe, Beadle, Reeve, or other
ſuch Officer; nor be compelled to come to
the *(b)* Sheriffs turn, to the *(c)* Leets of
the King or other Lords, for land annex-
ed to their Churches. And all this by the
courſe of the Common Law.

**So is every other clerk within or-
ders.**

To the Parſon belongeth of com-
mon right (as our books ſay) **the tenth
of all manner of yearly encreaſe**,
which we call Diſmes or Tythes. And
therefore by a leaſe of *Rectoria*, the Leſſee
ſhall have the Diſmes and offerings of the
ſame Church; for they are incident unto it.

And if a Parſon demiſe his glebe to a Lay
man, he ſhall pay Tythes, becauſe they are
of common right.

Every

Every Parson before he can be incumbent, must be presented to the Ordinarie, who is to admit him. And therefore is allowed time to inquire of the Clerks habilitie. As if he be presented to the Bishop when he is readie to ride, who willeth him to come to him within three days to be examined: if he come not then, nor within six months after, the Bishop may collate by laps; for there be many things to disable him from having the Benefice. As if he be crimineus, insufficient, a Villain, have not his Letters of Order, &c. And if a meer Layman be presented, admitted, and instituted, and no sentence of deprivation or nullitie given, the Ordinary cannot collate by laps: for till that time, the Church is full to all intents, when the ordinary admitteth him to be able, that is called an admission, when he admitteth him to the charge, as to say to the Clerk *Institue te habere curam animarum*, that is, institution. 14. *H.* 7. 21. 12 & 13. *El. Dy.* 292.

And then the Archdeacon is to put him in possession, by delivering the ring of the church door unto him, and ringing of bells, which is called an induction, and that being done, the party becometh an incumbent. Before which induction there is no possession or free hold in him, of glebe, or house, or desmes. So as a rent granted by a Prebendarie, after admission and institution, and before induction, with confirmation of 20 *El.* 528.

that found against him, then plead not guilty, though hee pleaded it not before.

1 E. 5. 5. **In Assises** of Novel Disseisin, and Nusance, **he may plead a special matter that amounteth but to the general Issue.** As in an Assise of Rent by Dean and Chapter, to say that reseisin was made to the predecessor, and no seisin in him, or in any Successor since that time. Though in the presence of him that pleadeth it, it amount to no more, but that the Plaintiff was never seised, so as hee could not bee disseised.

(a) 9 E. 4. 21. **Upon** (a) **Enditements of Felony and Treason,** otherwise it is in Appeals, **the defendant being put to answer,** which is called an Arraignment, **is not allowed** (b) **counsell, if he deny the fact.** For either his consience perhaps will sting him so vter the truth, or otherwise by his gesture, countenance, or simplicity of speech, it may bee discovered, which the artificial speech of his Counsell learned, would hide and colour. Also himself can best answer to the fact. But if hee plead Sanctuary, or any other matter in Law, then hee shall have counsell. **A presentment in the Leet or Sheriffs turn, after the day of the presentment** bindeth the party for ever, and is not reuerseable, **but in cases that touch ones free-hold:** as that one ought to cleanse the High-way or such like, *ratione tenure sue*: therefore the course is to remove such presentments into the Kings Bench by a *Certiorari*, where hee may traverse them.

(b) *Stamf.* 151. *b.*

1 H. 7. 23.

32 H. 8. *Dy.* 23.

41 E. 3. 27.

5 H. 7. 3.

CHAP.

CHAP. 33.

Of Confessions.

CONfession is when the Defendant confesseth the Plaintiffs action to be good. The Defendant confessing an Enditement of Felony may accuse others, in which case wee call him an Approver. And one cannot (a) bee an Approver, but in felony or Treason. And that upon an (b) enditement onely, and though it bee (c) after not guilty pleaded, yet before verdict hee may become an Approver. But upon an appeal one cannot bee an approver. Not without (d) confession of felony before the Judges, which confession must bee (e) upon an enditement precedent (that the Judge may at any time give judgement to attaint him) not upon an arrest for felonie of the same offence. But hee cannot approve one that (f) received him, for it must be of such an offence as hee himself did, together with the other: nor one that (g) abetted, and procured him to commit the felony, for hee confesseth not himself guilty of the same offence, in as much as hee cannot abet himself.

(a) 9 *H.6.Co.1.*
(b) 1 *H.7.5.*
(c) 1 *H.7.ibid.*
(d) 1 *H.5.Co.* 441.
(e) *Stam.*143.a.
(f) *Stam.*143.c.
(g) 10 *E.4.14.*

Statutes.

*Westm.*1.cap.12. Notorious felons which

will not put themſelves upon an enqueſt at the Kings ſuite againſt them, ſhall bee put to a pain *fort & dure*, as thoſe which refuſe to bee tried by the Law of the Land.

(a) The Stat. 32. H. 8. cap. 21. ſo reciteth it.

One that flyeth to a Church (a) **or Church-yard, and confeſſeth before the Coroner when he cometh, the certainty of any bar, felony, whereby life or member is to be loſt before he be thereof attainted,** whether upon an enditement or appeal, as that he hath ſtolne ſuch or ſuch a thing, killed ſuch or ſuch a man. But at the firſt taking of the Church, it is enough to ſay, hee taketh it for a felony, which hee hath committed generally **may abiure,** and ſo ſave himſelf But not in caſe of high Treaſon, or petty Treaſon, for the Coroner cannot attaint him upon his confeſſion thereof, becauſe hee is not his Judge of ſuch a crime: neither can be his Judge as hee is Coroner, although hee have a Commiſſion from the King to do it. And if the offender, being in the Church, will of purpoſe confeſs a felony, to the intent to eſcape of treaſon, yet if the Coroner have information that hee is charged with a Treaſon, hee may not ſuffer him to abjure. And that for the Kings advantage, who is to take more benefit if hee be attainted of Treaſon than of felony, becauſe of the eſchete. The ſame Law it is of petty Treaſon, for the Coroner can no more record his confeſſion of that than of high Treaſon: neither may the Coroner if hee be informed that he have committed petty Treaſon, ſuffer him to abjure

Stamf. 119. b.

Stam. 116.

jure of felony, and that in respect of the heinousness of the offence, notwithstanding the King bee to have no more advantage in petty treason than in felony. Neither can a man abjure for petty-larceney, because hee is not to suffer death for it likewise. *Br. Coro.* 182.

Abiuration is his (*a*) **oath before the Coroner himself to depart the Realm for ever at the time and place set him: going the direct way thither: tarrying there but one flood and ebb if he can have passage: and till he can so pass going every day into the sea up to his knees to assay if he may pass over, and if he cannot pass within 40 daies, then to put himself again into the Church as a felon, &c.** And this abjuration is an (*b*) attainder in it self (and that the strongest that can bee, being by his own confession) and a (*c*) forfeiture of his Lands. And there is a writ of eschete of Land for felony, *pro quia abjuravit regnum.* And therefore he (*d*) that is hanged upon judgement against him, and becometh alive again, cannot abjure (but an abjuration in that case is an escape) for one cannot have two judgements for one offence. (*a*) *Stam.* 119. *b.* (*b*) *Stam.* 122. *c.* (*c*) 4 *El. Fl.* 262. (*d*) 3 *E.* 3. *Co.* 33. *f.*

Statutes.

9 E. 2. **Stat. de artic. cleri cap.** 10. Those that abjure may not bee molested whilest they are in the street, and whilest they be in the Church, their keepers may not tarry in the Church-yard.

9 E. 2. **Stat. de artic. cleri. cap** 15. A Clerk

ſhall not bee compelled to abjure, but to have his Clergy.

21 H. 8. cap. 2. Immediately after confeſſion, and before abjuration, the felon ſhall bee marked in the hand with an hot Iron, with the ſign of an A. The felon muſt take his paſſage at ſuch a day and time as the Coroner ſhall limit, elſe hee ſhall loſe the benefit of ſanctuary, and bee taken out, and further ordered according to his demerit, without reſtitution to ſanctuary.

22 H. 8. cap. 14. If hee bee found out of the place, hee ſhall dye for it.

22 H. 8. cap. 12. All abjurations ſhall be made to certain priviledged places within the Realm, mentioned in that act, there to remain during his life.

CHAP. 34.

Of Replication, Rejoynder, Sur-rejoynder, &c.

The mutual Pleas of both are the debating before iſſues, or an iſſue it ſelf.

Debating before iſſue, is the diſcuſſing of the material things, to draw it to ſome one iſſue. As in an action of treſpaſs or an aſſiſe, if the Defendant claim by a leaſe from the Plaintiff to *A*, who granteth his term to *B*. and to *B*, the defen-

defendant, the Plaintiff must answer onely to his own Leafe, for the assignments of *A.* are but conveyances, and not material. But in an assise, if the defendant derive his interest from a stranger, and that *A.* was seised and enfeoffed *B.* who enfeoffed *C.* and *C.* the Tenant: there the Plaintiff may traverse any of the mean conveyances, for they are all material.

Therefore repugnance of a Plea unto it self is a fault in pleading, as in an action of Trespas of his house, and walls broken down, the Defendant cannot plead touching the house, not guilty, and as to the breaking down of the walls justifie, for this carrieth a repugnancy in it, in as much as the house and the wall are all one thing.

So is a departure, where hee forfeiteth not the matter of his plea that went before, but cometh in with a new matter. As if the rejoynder bee a matter puisne, underneath the matter of his bar, not above and going before it. As in an action of Trespas, the Defendant pleadeth a descent unto him of the Land, the Plaintiff saith, that after the descent the Defendant enfeoffed him. Now if the Defendant rejoyne that the feoffement was upon condition, and hee entred for the condition broken; this is a departure for the matter of the bar, that is, the descent, is before the matter of the rejoynder, that is to say, the entry for the condition broken, whereby the feoffement is avoided. So if in an assise, the Defendant

pleadeth the feoffement of *J. S.* and the Plaintiff make title to himself by diſcent, and that hee was diſſeiſed by *J. S.* who enfeoffed the Defendant, or that hee enfeoffed *J. S.* upon condition, who brake the condition, and afterwards enfeoffed the defendant, &c.

Now if the Defendant ſay that after the diſſeiſin (or condition broken) and after the feoffement of *I. S.* to the Defendant, the Plaintiff did releaſe to the Defendant, or confirm the eſtate of the Defendant, this is a departure, for that is a matter that groweth after the feoffement pleaded in bar. But if hee plead ſuch a releaſe or confirmation from the Plaintiff to *I. S.* that is no departure, for it is a matter before the feoffement, or in an action of treſpaſs for goods, if the Defendant title himſelf by the gift of *I. S.* and the Plaintiff ſaith, that himſelf was poſſeſſed till *I. S.* took them from him, and gave them to the Defendant. Now the Defendant may ſay, that after the taking the Plaintiff gave them to *I. S.* who gave them to the Defendant; for although the Defendant might have pleaded theſe things at the beginning, yet in as much as it is purſuing, and fortifieth his bar, and no puiſne matter underneath the title of his bar, but eigne, and above the matter of his bar, therefore it is no departure. So a plea in barre which is intendible at the Common Law, cannot bee maintained by a matter of cuſtome, or by ſtatute Law. As in an aſſiſe the

tenant

nant pleadeth in bar a deviſe unto him-
ſelf of the Land being deviſible by the cu-
ſtome, the Plaintiff ſaith that the Deviſor
was within age at the time of the deviſe.
Now if the tenant ſaid that by the cuſtome
here an infant of fifteen years of age may
make a deviſe: This is a departure, for the
cuſtome pleaded in bar ſhall bee entended of
thoſe that may make a deviſe by the Com-
mon Law. So if in an action of treſpaſs the
Defendant plead in bar a leaſe for fifty years
from a houſe of Religion, and the Plaintiff
avoid it by reaſon it was made within a
year before the diſſolution, and ſo void by
the Statute 31 H. 8. Now if the Defendant
will alledge that by the ſame Statute it is
provided that all ſuch leaſes ſhall bee good
for 21 years, and ſo maintain the leaſe to
bee good for ſo many years, this is a depar-
ture; or if one plead a fine, and that being
avoided, becauſe the parties to the fine had
nothing, will maintain the fine to bee good
by the Statute 1 H. 3. becauſe hee had levied
the fine *ceſti qui uſe*. Laſtly, when matters
are pleaded which offer ſeveral iſſues, that
is termed a double plea, and is a fault in
pleading. As in an aſſiſe to plead a feoffe-
ment of the anceſtour with warranty. In
debt upon a ſimple contract to plead pay-
ment and an acquittance. In an aſſiſe to
plead divers deſcents of the Land in fee-
ſimple, for every of them requireth a ſeve-
ral anſwer. But in an aſſiſe to plead divers

deſcents

diſcents in tail, is not double, for one anſwer maketh an end of all, that it is to deny the gift in tail. So as the matter cannot come but to one iſſue: So in an action of debt to plead fully adminiſtred, and ſo riens *entier mains*, for one anſwer, aſſets entier *mains* ſerveth.

So is it alſo of two or three matters together with the general concluſion, as in debt upon an obligation to ſay, that hee is not lettered, and the deed was read unto him in another ſort; and further, that hee delivered it upon a condition, which is not performed, ſo not his deed. So to juſtifie an arreſt for twenty cauſes of ſuſpition of felony is not double, for one anſwer ſerveth *Diſcontinuance demeſne*. No more to aſſign in a Writ of error as many errors as appear in the record, for in *mille eſt erratum*, anſwereth them all. But to aſſign divers errors en *fait* is double, for theſe are to bee tried by the Countrey. And the reaſon of all this is, becauſe upon divers iſſues joyned, if one bee found for the party, and another againſt him, the Court ſhall bee inveigled, and not know how to give judgement, whether for him, or againſt him. But to plead a feoffement with warranty, and relye upon the warranty onely is not double, for hee cannot plead the warranty without the feoffement.

Of the firſt ſort are Replication, rejoynder, ſurrender, &c.

In

In an Assise against many, if each (a) the whole tenancy severally, and (b) several matters in bar: or (c) Null tort, and the other in bar: other- (d) it is if one plead in bar, and the o- Joyntenancy by deed: the Plaintiff at peril must chuse his Tenant. And after issue for the whole, that, viz. the ancy, shall be first enquired of. And be- found for the Plaintiff, then the other shall be enquired. Being found a- him, and no title made against the indeed, the writ shall abate.

In an action of Trespass mer tran- , although the defendant justifie by special matter, as in a (a) Trespass of , by commandement of J. S. whose property is, in (b) assault and battery, (c) appeal of mayme, in his own de- upon the Plaintiffs first assaulting of ; in false imprisonment by (d) being Constable of the Town, and that the Plaintiff brake the peace, or (e) by an arrest suspition of felony, or by (f) the com- mandement of J. S. to seise the body of the Plaintiff in ward, by reason his ancestor whose heir hee is, held of J. S. by Knight service, &c. yet the Plaintiff may take issue that it was done *De son tort demesne*, which to say, wrongfully by the Defendant, without answering to that matter. But if, the justification bee by matter of writing, or record, as in false imprisonment, by (a) a warrant of Justice of peace to arrest him, or

(a) 33 H. 6. 36.
(b) 33 H. 6. 36.
(c) ces Br. ass. 5 383.
(d) 44 E. 3. 23.
8 ass. Pl. 1.
Ces ibid.
(a) 19 H. 6. 65.
(b) 34 H. 6. 16.
(c) 41 ass. Pl. 21
(d) 5 H. 7. 6.
(e) 2 E. 4. 9.
(f) 22 ass. Pl. 85
(a) 21 H. 6. 5.

a

(b) 5 H. 7. 6. 2 E. 4. 9. (c) 44 E. 3. 18. 22 ass. Pl. 185. (a) 12 E. 4. 10.

a (b) *Capias* that came to him as Sheriff take the body of the Plaintiff, or if it be (c) title or licence (a) from the Plaintiff there *de son tort demesn* is no plea, but special matter must bee answered. So waies in a trespass local, as of his broken down, &c. if the Defendant [illegible] a stranger to the Land, whether to the [illegible] hold, or though it bee but to a lease of it, [illegible] justifie by his commandement. And [illegible] wise in a (f) replevin which is real, the title or special matter must alwaies bee [illegible] versed. **If it be a trespass upon land, [illegible] defendant justifying in some other [illegible] than the Plaintiff meaneth, the Plaintiff may make a new assignment,** setting forth the place more specially. As if the defendant justifie in a place called *A.* as his free-hold the Plaintiff may say the place where, &c. is called *B.* other than the place called *A.* and then the defendant may plead all anew.

(f) B. Roy.

27 H. 8. 7.

CHAP. 35.

Of Issues.

AN Issue is when both the parties ioyn upon somewhat that they referre unto a trial, to make an end of the plea. And it is of the fact, or law of the fact, which is commonly termed by the general name of issue, **when the proper contradiction of that which one alleageth is set down by the other,** which is properly termed a traverse. As in debt upon an Obligation for performance of Cove-

nants

and the defendant plead hee hath per-
all the Plaintiff must shew some in 15 H. 7. 2.
which the defendant hath broken,
upon issue shall bee joyned: but can-
that the defendant hath not per-
all. For in Logick there bee three
of contradictions: General, when
the propositions are general, as, All
venants are broken, None of the co-
are broken. Particular, when one is
al, the other particular, as, All the
nants are broken, Some of the co-
are not broken. None of the co-
are broken, Some of the covenants
ken. Proper, when both the propos-
are proper, as, This covenant is bro-
This covenant is not broken. The two 33 H. 6. 9.
make no issue in our Law, but the
onely: and every issue is of an affir-
ve and a negative. **After which if any**
ficiency of pleading appear in the re-
whether the issue bee joyned thereupon
which we call a *Demurrer*, or no, **the par-**
must replede or begin a new where
such defect was. And in this case a Jury 35 H. 8. Br. re-
ady at the bar that to pass upon the pled. 54.
shall bee discharged. As if the bar be 7 H. 7. 3.
and the replication ill, and issue taken
to the judgement must bee that the
iff must make a new replication, and
ar shall remain. So if the bar bee
and likewise the replication, but the
nder ill, and the issue taken upon the
nder, the defendant must take a new
nder, and the replication shall remain.

But

But if the bar be ill, and the replication g[illegible] and the issue taken upon it, now they [illegible] plead all a new, because the bar wh[illegible] first of all is vicious.

But no repleader shall be in an [illegible] if the Plaintiff have disclosed a suffi[illegible] title: for in an assise no Land in certa[illegible] demanded, but an assise onely prayed. [illegible] therefore where a sufficient title is di[illegible] sed, the Plaintiff shall have judgement [illegible] on seisin, and disseisin found for him. [illegible] no repleader shall be notwithstanding th[illegible] the Tenant have made a (a) vicious ba[illegible] or (b) misrejoyned. Otherwise it is if th[illegible] Plaintiff take issue upon an insuffici[illegible] bar.

(a) 14 H. 7. 12.
(b) 5 H. 7. 29.
33 H. 6. 37.
5 H. 7. 29.

If the tender of this issue come on th[illegible] Plaintiffs part, the form is, *Et hoc pe[illegible] quod inquiratur per recordu, vel patriu, &c.* If on the Defendants part, then it [illegible] *Et de hoc point se super recordum illud [illegible] super patriam.*

19 H. 6. 57.

Issue in a writ of right cannot be [illegible] ned, wee call it joyning of the mise, [illegible] the meer right, but by the party [illegible] not by Atturney.

15 H. 7. 13.

Where the Plaintiff in his replicati[illegible] maketh title at large, without traversing [illegible] confessing and avoiding the bar, or [illegible] way medling with it, the tenant [illegible] joyn issue upon the title by saying, *Vei[illegible] assise sur la title*, that is, Let the assise [illegible] upon the title, which is called a pleading [illegible] the assise at large. This to bee understo[illegible]

15 H. 7. ibid.
5 H. 7. 29.

whe[illegible]

where the title is by a matter *en fait*, but not record, or done (a) in a forein County, for they are not triable by the assise. (a) 5 H.7.ibid. 14 H.7. 6.

And in a personal action, whether tres-pass or replevin where justification is made or damage fesant, for that is meerly in the personality, where the title of the land is in question, lyeth not till issue toy-ned. And yet in that case it never lyeth for Tenant for life, but onely for tenant for yeers, Waunt, &c. 46 E.3.11. 46 E. 3.11. 10 H.6.26. 14 H. 7. 6. 4 H.6. 10.

Prerogative.

And in these actions shall be of the King the issue toyned onely, though the King be seised but in his natural capacity, as in the right of his Dutchy of Lancaster. 5 E.4. aid de Roy. 50. 3 H.6.p. Pl.216.

CHAP. 36.

Of Trial by Jury.

This being of a matter *en fait*, that is to say, done in the Country. For a Jury shall not be charged with a matter in Law: nor it shall not be given in evidence unto them. But they will take knowledge of the Law, they may give their virdict generally, *viz.* where a virdict may bee given at large. As upon an issue of *Nul tort nul disseisin*. So the Jury may finde of themselves matters of record 9 H.6.38. 14 El.Pl. 410.

record if they will, and although it bee not given in evidence. And therefore a fine or common recovery may bee given in evidence without shewing it under the great Seal, or Seal of the Court, or vouching the Roll of the recovery, for the Jury may finde them if they will. But peradventure they are not bound to finde it upon pain of attaint, unlesse it bee shewed under the Seal.

Old N.B.171. 11.b.

The form of the writ of venire facias.

Is triable by the oath of twelve free and lawful men of the same County, indifferently chosen, whom we call a Jury, and the making of the Jury is called a panel or array. And these must be 12 for the verdict no more or less, as of (*a*) 11 or 13 is void: free, not (*c*) villeins, nor (*d*) aliens: lawful, for one outlawed may not be a Juror, because hee is not *Legalis homo*, (*e*) and of the same County, for upon (*f*) a trespass local, as grass cut down in the County of *D.* where the Trespass was in the County of *S.* if the Defendant plead not guilty (as he may) and the Jury finde him guilty in the County of *S.* the verdict is void. But if they finde them guilty generally, it is not void.

(*a*) 41 *ass. Pl.*
(*c*) 26 *ass. Pl.* 28
(*d*) 14 *H.* 4. 19
(*e*) 21 *H.* 6. 30.
(*f*) 9 *H.* 6. 63.

28 *H.* 8. *Dy.* 30.

But upon an issue whether the Executors have assets in their hands, the Jury may finde the assets in any County, for it is but a transitory thing. Lastly, the Jury must be indifferently chosen, so as neither the Sheriff that maketh it (for that is good cause of challenge to the panel or array) nor the Furors that are to pass upon it (for that is good cause of challenge to the

pols) bear either favour or malice to any party. As for the Sheriff to put in any Juror at the parties denomination. And either the Sheriff or Juror to be of his (*a*) Fee, or his (*b*) servant, or within (*c*) his distress, whether his Tenant (immediate or not immediate, as (*d*) holding of *J.S.* who holdeth of the party) or not his Tenant, as where hee is to come to the parties Hundred, or the party hath a Rent charge going out of his land. To bee of kin to the party, for Cousinage in the Sheriff is a good principal challenge to the array, and in a Juror to the Poll: although it bee in the ninth degree, and that one cannot bee heir to the other of the land invariance. As if husband and wife be vouched (which is intendible for the warranty and land of the wife) and the Sheriff or Juror bee Cousin in the ninth degree unto the husband, the reason whereof is, for the affection which the Law intendeth that the one doth carry to the other. And because one may bee heir unto the other of other land. And therefore it is a good challenge in personal sutes also: To have been (*a*) arbitrator on his part in that matter. To (*b*) have an action of battery depending against the party, or an action of debt by the party against him, &c. The Juror to have (*c*) taken money for his verdict to have (*d*) given it before hand, or to have (*e*) passed formerly in the same matter, and such other things as of themselves carry favour or malice in them, and are called principal challenges. So

7 *H.4.10.*
(*a*) 8 *ass.Pl.23*
(*b*) 21 *E.4.67.*
(*c*) 20 *H.6.39. for the Sheriff.*
(*d*) 38 *E.3.25.*
38 *E.3. ibid.*
15 *E.4* 18.
Br.chall. 68.
38 *E.3. ibid. maketh a query of this.*
15 *Eliz. Pl* 425. *for the Sheriff.*
21 *E.4* 63 *for a Juror.*

(*a*) 21 *H.6.39 for the Sheriff.*
3 *H.6.24. for the Juror.*
(*b*) 11 *H.4.26.*
(*c*) 49 *E.3.2.*
(*d*) 49. *E.3.1.*
(*e*) 7 *H.4.11.*

of those which only do induce it: as to bee the parties (*f*) Master, (*g*) Councellor, Attorney, (*h*) Steward of his Mannor, to (*i*) sue him in an action of debt, &c. to bee (*k*) of the same society with him, as if both bee of Graies-Inne, or the (*l*) party to bee within his distress, or (*m*) hee to have passed before upon such another matter.

(*f*) 21 *E.*4.67. *for the Sheriff* 14 *H.*7.2. *for a Juror.*
(*g*) 49 *E.*3.1.
(*h*) 14 *H.*7.2.
(*i*) 11 *H.*4.26.
(*k*) 20 *H.*7.2.
(*l*) 14 *H.*7.2.
(*m*) 18 *E.*4.13

Statutes.

Westm.2. cap.38. In an assise no more shall be summoned but 14.

Men above lxx. years of age continually sick, or sick at the time of Summons, shall not be returned in Juries or Assises: nor any that dwell out of the County, unless it be in grand Assises.

Artic. super chart. cap.9. 34. E.3. cap.4. Juries shall be made of the next people of the County.

11 H.6. cap.1. None dwelling in Streets shall be of a Jury.

9 E.3. cap.4. A deed pleaded in a Franchise shall be tried in the County where the action is brought.

2 E.6. cap.24. Upon stroke or poyson in one County, the party dying in another, an endictment and trial may bee in the County where hee dyeth. And an appeal sued

there, and tried by twelve men of the
e County.

Likewiſe the acceſſaries in one County to
urder or Felony in another County, ſhall
indicted, arraigned, &c. in the County
ere the offence of acceſſary is done.

33 H. 8. cap. 20. Endictment of a perſon
natick, being at the time of confeſſion of
eaſon before the Councel, of perfect me-
ry, and ſo certified by them, ſhall be tried
Free-holders of any Shire to bee appointed
commiſſion. And the trial whether hee
e culpable or not, ſhall bee there in his ab-
ce.

13 H. 8. cap. 23. Confeſſion of Treaſon,
iſprision of Treaſon, or Murder being
de before the Councel, or three of them, or
y vehemently ſuſpecting one of ſuch an
fence, it ſhall bee enquired, heard, and de-
rmined by Commiſſion out of the Chan-
ry, in the Shire or place limited in that
ommiſſion, by ſuch lawful perſons as ſhall
e returned; wherein no challenge for the
ire or Hundred ſhall be allowed.

28 H. 8. cap. 13. and 27 H. 8. cap. 4. All
reaſons, felonies, robberies, murders, and
nfederacies within the Admirals Juriſdicti-
n ſhall bee enquired and determined in
ch form of Law as if it were done upon
e Land, by commiſſion directed to the
dmiral and three or four other aſſigned

by the Lord Chancellor in the Shire him in their Commiſſion, where no challe ſhall be for the Hundred.

32 H.8. cap.4. The endictment and raignment of treaſons and miſpriſion treaſons in *Wales*, or elſe where the Writs of the Chancery of *England* run not, ſh bee in ſuch Shire, and before ſuch Comm ſioners as the King ſhall appoint.

35 H.8 cap 2. All treaſons, miſpriſion or concealments of Treaſon done out *England*, ſhall be enquired, heard, and determined in the Kings Bench by men of the Shire where the Bench ſitteth, or elſe before Commiſſioners, and in ſuch ſhire as ſhall be limited by Commiſſion.

1 And 2 Ph. and Mar. cap. Trials for treaſon ſhall bee according to the courſe of the common Law.

23 E.3. cap.3. No enditor bee put in Enqueſts upon the deliverance of Endictes of Felonies or Treſpaſs.

Weſtm.2. cap.38. None ſhall bee put in Aſſiſes or Juries triable in their own Shire, but ſuch as have 20 s. a year Free-hold, nor in aſſiſes triable out of their own Shire, unleſs they have 40 s.

21 E.1 *De ponend' in Aſſiſa.* None ſhall be put in aſſiſes triable out of their own Shire but ſuch as have lands to the yearly value of C.s. nor in aſſiſes triable in their own Shire, unleſs they have 40 s.

2 H.

2 H.5. cap.3. None ſhall paſs in an Enqueſt upon the trial of the death of a man, or between party and party in plea real or perſonal, whereof the debt and damages amount to 40 marks, unleſs he have lands of the yearly value of 40 s.

33 H.8. cap.13. In Cities, Boroughs, or Corporate Towns, an inhabitant being worth 40 l. in goods, ſhall bee admitted in trial of Murders and Felonies in every Seſſion and Gaol-delivery for that Town, though he have no free-hold.

35 H.8. cap. 6. made perpetual.

2 E.6. cap.32. The cauſe of having 40 s. value, muſt bee inſerted in the *venire facias*; and bee of lands out of antient demeſne. Where that clauſe needs not, the Jurors muſt expend ſome land of Free-hold out of antient demeſne within the County where the iſſue is to be tried.

27 Eliz. cap. 6. Where the Jurors returned in the Kings Bench, Common place, Exchequer, or before Juſtices of aſſiſe, ought to have 40 s. Free-hold, there they ſhall from henceforth have 40 l. yearly Free-hold out of antient demeſne, in the County where the iſſue is to bee tried. And the clauſe thereof inſerted in the *venire facias*. Theſe two Statutes extend not to Corporations.

27 Eliz. cap. 7. No Bayliff of Liberty ſhall return to the Sheriff, or deliver unto him

the name of any perſon to bee returned in a Jury without ſome addition whereby the party may bee known. Neither ſhall the Jury, &c. return any Juror out of a Liberty without ſome addition whereby hee may be known, nor within a Liberty with other addition than that is delivered unto him by the Bayliff, &c.

8 H.4 cap.3. Every Juror returned within the County of *Middleſex* ſhall bee called the fourth day of their return, and appearing at the ſame day, their appearance ſhall bee recorded, and they ſhall not be amerced, nor loſe their iſſues.

5 E.3. cap.10. A Juror taking of the one part or of the other, ſhall never be of Jury more, and beſides impriſoned.

34 E.3 cap.8. The party or any ſtranger may ſue him for it.

38 E.3.cap.12. And both the Jurors and the embracors to procure it, being thereof attainted, ſhall pay ten times ſo much as hee hath taken.

Weſtm.2.cap 30. Aſſiſes of novel diſſeiſin, mortdaunceſter, and attaints, ſhall be taken thrice a year by two Juſtices aſſigned, aſſociated with one or two diſcreet Knights in the Shire where they come.

In every Shire before their departure they ſhall appoint the day of their return: And adjourn the aſſiſes if the taking be by any means deferred.

Alſo

Also in assises of mortdancester being required, they may adjourn into the Bench if need be. And when it cometh to the taking of the assise, the Justices of the Bench shall send it back again to them.

All pleas in either of the Benches that require small examination, shall be determined before them.

27 El. cap. 4. *Statutum de finibus levatis.* Such enquests being taken, shall be returned into the Bench, and there judgement shall be given.

Enquests and Recognisances determinable before Justices of either Bench: shall be taken in vacation time, before any of the Justices before whom the plea is brought, being associate to one Knight of the same Shire, where such Enquests shall pass, unless it require great examination.

12 E. 2. cap. 3. Stat. Ebor. Enquests in pleas of land (that require no great examination) shall be taken in the County before a Justice of the place where the plea is accompanied with a substantial man in the Country, Knight or other, so that a certain day be given to the Bench, and a certain day and place in the Countrey, in presence of the parties demanding of the same.

Enquests in pleas of land that require no great examination, shall bee taken in the Countrey (in manner aboveſaid) before

two Justices of the Bench.

2 E.3. cap. 17. All such Enquests in plea of land shall hereafter bee taken as well of the request of the Tenant, as Demandant.

42 E.3. cap. 11. *Nisi prius* shall not bee granted before the name of the Jurors returned.

7 R.2. cap. 7. In all manner of pleas where an *Nisi prius* is grantable of office after the great distress returned, and thrice served before the Justices against the Jurors, and thereupon the parties demanded if any of the said parties will pursue, or if the parties refuse to have *Nisi prius* in the case, then at the sute of any of the Jurors that is present a *Nisi prius* shall bee granted for ending of the quarrel.

14 E.3. cap. 16. The *Nisi prius* in the Kings Bench shall bee granted before a Justice of that place, if any Justice of that place may well go into those parts. Else before a Justice of the Common place, &c. otherwise the chief Baron being a man of the Law, if, &c. or else before the Justices assigned to take assises in those parts. So that one of them bee a Justice of one Bench or other, or the Kings Serjeant sworn.

18 Eliz. cap. 12. The chief Justice of *England* upon issue joyned in the Kings Bench or Chancery, and the chief Justice of

of the Common pleas, and chief Baron of the Exchequer, upon iſſues joyned in their ſeveral Courts (or in their abſence two other Juſtices or Barons) or made Juſtices of *niſi prius* for the County of Middleſex, in all iſſues joyned to ſit in Weſtminſter-Hall within the Term, or four daies after.

4 E. 3. cap. 11 confirmed. 7 Ric. 2. cap. 15. Juſtices of *niſi prius* ſhall enquire, hear, and determine, as well at the Kings ſute as the parties, all maintainers, conſpirators, makers of confederacy, and committers of Champerty, and all other things contained in the ſaid Article, as well as Juſtices of Eyer ſhould do, if they were in the ſame County.

14 H. 6. cap. 1. Juſtices of *niſi prius* have power in caſes of Felony and treaſon as well upon acquittal, as attainder, and thereupon to award execution.

Stat. Ebor. 12. E. 2. cap. 2. Upon a deed denied where witneſſes are named, proceſſe ſhall bee awarded againſt the witneſſes, if they come not at the grand diſtreſs, or upon a *nihil non inventus* returned, yet the taking of the inqueſt ſhall not bee deferred. If hee come at the grand, and the enqueſt remaineth untaken for ſome cauſe, the witneſſes ſhall have *idem dies*, and not appearing, then the firſt iſſues returned upon them ſhall bee forfeit, and the enqueſt taken, notwithſtanding their abſence.

An

An Enquest shall bee taken notwithstanding the absence of witnesses dwelling in a Franchise where the Kings Writ runneth not.

7 H.4.17.
36 H.8.Dy.61. **Four of the Jury must also be of the same Hundred**, and so many are enough though it bee in an attaint where the Jury is 24. In an information upon the Statute of plurality of Farms, for having seven Farms in seven Towns in four several Hundreds: If four of the Jury have any thing, or dwell within any of the four several Hundreds it is sufficient.

Statutes.

15 H.8. cap.6. made perpetual, 2 E.6. cap.32. Six sufficient Hundreds shall bee returned in every Jury.

27 Eliz. cap.6. If two sufficient Hundreds appear in any personal action, it is enough.

If the thing in issue lye in the notice of two several Counties, and not of one only, for (a) onely two Counties may joyn, and no more. And two may though they bee not the next, as *Kent* and *Devonshire*, **the Jury shal be made (b) equally out of both:** That is, six out of the one, and six out of the other. And this we call a Joynder of Counties, as in (c) an action of Trespass, if the Defendant justifie for common appendant to Land in another County, or in a Writ of anuity and Count of a seisin in another County then where the Church is, out of which the anuity goeth.

(a) 15 *Eliz.*

(b) 49.*ass.Pl.* 1.1.

(c) 49 *E.*3.19. 21 *H.*6.3.

Sta-

Statutes.

7 Ric. 2. cap. 10. An assise of novel disseisin of Rent out of the Tenements in divers Counties, shall bee in the confine of the said Counties.

But upon an Endictment of an offence against the Crown, the trial shall never be by toynder of Counties. Therefore an Endictment that one stroke *J. S.* in one County, of which stroak hee dyed in another County, is no good Endictment, because it cannot bee tried, for that the Counties cannot joyn in an Endictment. And therefore before the Statute 2 and 3 *E.* 6. (which altereth the Law in this case) they were wont to carry the corps into the County where the stroak was. But otherwise it is in an appeal. 4 *H.* 7. *Coro.* 60. 6 *H.* 7. 10.

But if the Defendant plead in any action, as in a *homine replegiando*, or though it bee but in a Writ of Tresspas or Debt, **that the Plaintiff is a villein regardant to a Mannor of his in another County, yet the same shall be tried in the County where the writ is brought.** And this is in *Favorem libertatis*. 19 *H.* 6. 18. *by the common law* 40 *E.* 3. 36.

23 *E.* 3. cap. 1 confirmed. 8 *H.* 6. cap. 28. In every suite between an Alien and a Demesne, (though the King bee a party) the one half of the Jury shall bee the Aliens. If so many bee in that visne, and if there be not

not to that number, then ſo many as bee there not parties, nor with the party to the ſute.

Where a Peere of the Realm is party to the action, a Knight muſt be returned to the Jury.

2 *Mar. Pl.* 117.

Statutes.

Magn. chart. cap. 29. A Peere of the Realm upon an enditement of felony or treaſon ſhall bee tried by his Peers.

20 H. 6. cap. 9. Dutcheſſes, Baroneſſes, Counteſſes, ſole or married, ſhall bee tried (in ſuch caſes) as Peers of the Realm.

Proveable of the Stat. 7 E. 4. ca. 2. ſo reciteth it.

In a Court of Pipowders the trial is by the Merchants.

39 E. 3. 2.
39 E. 3. 2.
1 *Mar. Dy.* 98. *There muſt bee twelve beſide the four Knights.*
Brat. 42.

The Jury in a writ of right is called the grand Aſſiſe. Being **four Knights,** or other in default of Knights, **chuſing a Jury of 12. unto them.** So note 16. in all, for the grand Jury is alwaies about 12, and therefore no attaint lyeth for him that loſeth in a writ of right, becauſe it paſſeth by the grand aſſiſe which is more than 12.

Challenges are here allowed for the parties (if they will) both to the array and to the pols. And whether to the pannel or the pols, **are to be tryed by ſome of the Jurors, if it be** (*a*) **before any Jurors ſworn, the Court ſhall chuſe the Triors,** when any Jurors are ſworn, they muſt try it.

(*a*) 27 H. 8. 26.

Challenge to the array is when the Jury is not ſufficiently impannelled upon

inſt

juſt cauſe of challenge to the Sheriff, and afterwards to the Coroners, who by reaſon of juſt exception againſt the Sheriff made or ſhould make the array, the (*d*) **Court muſt chuſe certain** named Eſſoiers (*e*) **where the parties ſhall never have challenge to the whole array Challenge to the poll is when any of the Jurors are inſufficient to paſs upon the trial This challenge muſt be taken before the pannel be peruſed:** For if the Plaintiff challenge one, and when the pannel is peruſed, the defendant challenge the ſame perſon, yet the Plaintiff may releaſe his challenge, and then the Juror ſhall not bee drawn, becauſe the defendants challenge is nothing worth, in that it was not made till the pannel was peruſed, **and ſhall be tried by two of the Jurors choſen by the Court,** againſt whom no challenge ſhall be admitted, **but challenges that ſound not in reproach of the iuror,** as to be (*a*) of counſel with the party, or (*b*) within his diſtreſſe, to have (*c*) nothing within the hundred, or (*d*) not ſufficient free-hold, **ſhall be examined upon his oath,** which wee call an examination upon a *voyr dire*. **He that challenged the array if it paſs againſt him,** or (which is as ſtrong) if he releaſe it, **ſhall never challenge the polls without ſhewing cauſe preſently, which ſhall be tried out of hand.** Before the Clerk paſs through the pannel. So ſhall not any other challenge. **And after challenge to a Juror for one cauſe,** as favour, &c. **which paſſeth**

14 *H.* 7. 31.
4 *H.* 7. 3.
(*d*) 8 *H.* 6. 12.
(*e*) 15 *E.* 4. 24.
15 *E.* 4. 8.
27 *H.* 8. 26.
27 *H.* 8. 26.
(*a*) 49 *E.* 3. 1.
(*b*) 3 *H.* 6. 36.
(*c*) 19 *H.* 6. 9.
(*d*) 21 *H.* 7. 29.
27 *H* 8. 26.
7 *H.* 4. 46.
7 *E.* 4. 17.

passeth against the challenger, he shall not challenge him for another, as for having nothing in the Hundred, &c.

Stam. 157. *b. Do. St. p. Br. chal.* 11. *in an appeal.*

In endictments and appeals of Felony the defendant may challenge 35 Jurors without shewing cause, which is called a peremptory challenge.

Statutes.

22 H. 8. cap. 14. No person arraigned for any petty Treason, Murder, or Felony shall be admitted to any peremptory challenge above the number of twenty.

20 E. 4. 11. *Stam.* 159. *e.*

When there lacketh some to fill the Jury, as the greater part being returned dead, or not appearing. But if all the pols be challenged and drawn, there no *tales* shall be, but a new *venire facias* for *tales* referred to (*quales*) some like thing, other of the same sort shall be taken, for there may be many *tales* one after another (*a*) till it be full, which we call a *Tales*, which must be an (*b*) even number (*c*) less than the principal pannel, As a *decem tales*, *octo tales*, *&c.* or in an attaint where the Jury is 24. 20. *Tales*, *&c.* And (*d*) every tales must be of a less number than other. As after an *Octo tales*, a *Sex tales*, but not a *decem tales*; nor an *Octo tales* again.

(*a*) *Stam.* 155. *e.*
(*b*) *Bract. tales* 11.
(*c*) 37 H. 6. 12.
(*d*) 14 H. 7. 2.

Statutes.

35 H. 8. cap. 6. made perpetual. 2 E. 6. cap.

cap. 32. A *Tales* may be made up before Justices of Assise or *Nisi prius* of able persons of the same County, then present at the prayer of the Plaintiff or Demandant.

4 And 5 Ph and Ma. cap. 7. So for the King upon request by any authorised thereunto, or assigned of the Court, or by the party that followeth upon a penal statute as well for the King as for himself.

14 El. cap. 9. Such a *Tales de circumstantibus* before the Justices of *Nisi prius* shall bee granted at the prayer of the Defendant or Avowant.

But in Endictments and Appeals that touch life, a *Tales* may be of a greater number than the principal panuel. As 240 *Tales*, or as many as the Court will award, and that is in respect of the peremptory challenge of 35. 14 H. 7. 7.

The Jury being charged, may neither eat nor drink (but by leave of the Justices) before their verdict given, and doing it before they be agreed, it maketh their verdict void. After they be agreed, it is sufferable. 20 H. 7. 3. 6 H. 8. Dy. 3.

The Jury upon arraignment either at the (a) Kings suite (b) or in an Appeal **acquitting one that was found guilty of** the (c) **death of a man upon an enquiry** (d) **by the Coroners *Super visum corporis* must finde who did the fact.** But upon an Endictment (e) before the Sheriff or Justices of

(a) 14 H. 7. 12.
(b) 14 H. 7. *ibid*
(c) 13 E. 4. 3.
4 E. 6. 12.
(d) 13 E. 4. *ibid*
4 E. 6. *ibid*.
(e) 14 H. 7. *ibid*

of peace, for that is not of Record, as the finding before the Coroner is, (*f*) neither doth this take place in an acquitail upon an Enditement for the felonious taking of goods.

(*f*) 13 E. 4. *ibid.* 4 E. 6. *ibid.*

7 E. 6. Pl. 91. *ibid.*

The Jury in an Assise of *Novel disseisin* (which are there themselves properly called an assise) **shall inquire of the plea in abatement,** though the issue bee joyned upon the seisin and disseisin. **And thereto no plea in abatement is there answerable.**

34 E. 1. *De Conjunctim feoffatis.* The defendant in Assise alledging joyntenancy of his part with a stranger by Deed, the Plaintiff may aver him to be sole tenant; whereupon Processe shall bee made against both the defendant and the stranger. And if at the day both of them justifie the feoffement, they shall maintain the exception, and further answer to the Assise, as if the original had been purchased against him joyntly. If the exception bee proved false by the Assise, they shall have a years imprisonment, though the Assise pass for them. If the Defendant absent himself at the day, the Assise shall pass against him by default, though the stranger appear and justifie the Deed. Whether both, or one appear, if it bee found by the Assise that the Exception was truly alledged, the Assise shall pass no further, but the Writ shall abate. Such an Exception shall not bee alledged

ledged by the Bayliff of any Tenant. The like proceſſes in aſſiſes of *Mortdanceſter* and *Juris utrum*.

An Infant bringing an Aſſiſe, if a matter in fait, that is, done in the ſame County be pleaded againſt him, whether in Abatement, as in an aſſiſe of Rent, that hee had made his plaint of the ſame land whence hee ſuppoſeth this Rent to bee iſſuing; or in Bar (*b*) as the Deed of his Anceſtor, with warranty, **the Jury ſhall inquire of all the circumſtances.** Otherwiſe it is a Writ (*c*) of Entry *ſur diſſeiſin*, or other (*d*) *Præcipe quod reddat*: for there the point put in iſſue, and no other, ſhall be tried by the Jurors. Otherwiſe it is alſo in an Aſſiſe upon pleading a recovery (*e*) againſt him, or other matter of Record: in that caſe he muſt anſwer, and the Jury ſhall not inquire of the circumſtances, for the Court ſhall plead and maintain for him. 11 *Aſſ. pl.* 6. (*b*) 48 *E.* 3. 33. (*c*) 9 *E.* 4. 34. (*d*) 48 *E.* 3. *ibid.* (*e*) 48 *E.* 3. *ibid.*

The like inquiry of the circumſtances ſhall be, if in an aſſiſe brought againſt him he plead to the aſſiſe at large. Otherwiſe it is if he plead in Bar, for there if the Plaintiff make himſelf title as by a ſtatute Merchant, &c. and the Infant traverſe the title which is found againſt him, the plaintiff ſhall have judgement without inquiring of the circumſtances, becauſe the iſſue is taken out of the point of the aſſiſe, and therefore is all one as if the Infant were of full age. So that it is better for an Infant to plead unto the aſſiſe at large, than otherwiſe. 28 *Aſſ. pl.* 21.

Old N.B.104. The form of an Assise of *novel Disseisin*, is this, *Rex vic' salutem. Quæstus est nobis A. qd B. injuste, & sine judicio disseisivit eum de libero tenemento suo in* N. *infra triginta annos jam ultimos elapsos. Et ideo tibi præc' qd si prædict' A. fecerit te securum de clam' suo pr'os tunc fac' tenement', illud reseisum de catallis quæ in ipso capt', & ipsum ten' cum catallis esse in pace usq; ad proximam assisam, cum Justic' nr'i in partes ill' venerint. Et in eadem fac' 12 liberos & legales homines de visam ille videre tan' illud, & nomina eorum imbreviari fac'. Et sum' eos per bonos sum' qd sint coram præfat' Justic' nr'is ad præfatam assisam parati inde facere recogn'. Et pona per vadium & salvos pleg' præd. B. vel balivum suum, si ipse inventus non fuerit qd tunc sit ibi ad illud recogn' auct'. Et habeas ibi summ' nomina pleg': & hoc breve. Teste, &c.*

34 El. D. 310. for all.

40 E. 3. 48.
39 Ass. pl. 13.

If the Tenant in a Mortdanceſter (be it Tenant of the land, or Tenant by his warranty) **traverſe any point of the writ**, as the dying ſeiſed of his Anceſtor, &c. which goeth in abatement of the writ, **yet the Jury muſt inquire of all the points**, as whether the Demandant be next heir, and whether his Anceſtor dyed within fifty years, &c. **and any one found againſt the Demandant abateth the writ.** But a plea in bar of the aſſiſe by matter of record, releaſe, collatteral warranty, or ſuch other matter as is out of the three points of the Aſſiſe, is peremptory to the Tenant, if it paſs againſt him. And if ſuch a Plea in Barre bee found againſt the

the Tenant, and yet the Jury inquire further, and finde one of the points of the Writ against the Demandant, as that his Ancestor dyed not seised, &c. hee shall recover notwithstanding that, for such an enquiry should not bee upon a plea in Barre. *Dyer* thinketh it to be so likewise, where the Tenant voucheth, and the Demandant doth counterplead the voucher, *viz.* that in that case though the counterplea bee found for the Demandant, yet that all the points must bee enquired and found for the Demandant, or else hee shall not recover. But *Fitzherbert* thinketh otherwise in that case, because it is a plea in Bar, and not to the writ.

For the Juries direction in their verdict greater liberty is permitted in pleading, and matter doubtful in Law, for a Traverse may be omitted. As in debt against an Executor, it is a good plea to say, Administration was committed to him, and therefore hee should bee named Administrator, and not Executor, without traversing that hee is not Executor, for the Lay-people know no difference between one administring as Executor, and one administring as Administrator. 9 E. 4. 33.

The special matter may be pleaded together with the generall issue, &c. As that the Obligation put in sute, was sealed by him and delivered to *A.* to keep till certain Indentures were made between the Plaintiff and him, before which Indentures made, the Plaintiff took the Obligation 9 H. 6. 38.

out of the poſſeſſion of *A.* So is it not his deed. This is good, and yet by this general concluſion the matter precedent ſhall not be waved, for it were perillous to put the ſpecial matter in the mouth of the Lay-people.

The Count may be abridged before verdict, ſo as the original remain true, as in an aſſiſe of his Free-hold, and make his plaint of Land and Rent, hee may abridge it for the Rent. In an aſſiſe of his Free-hold in *D.* and demand two Mannors in *D.* hee may abridge his plaint for one. But being of his Free-hold in *D.* and *S.* and demand one Mannor extending into both, he cannot abridge either of them, for then the writ remaineth not true. In a writ of waſte and aſſign it among other things, in racing of a Copper fixed to the ſoil, hee may abridge the waſte aſſigned in that, ſo as thereby he falſifie not his writ. But if the writ be *Quare vaſtum fecit in domibus boſcis & gardinis*, he cannot abridge the waſte ſuppoſed in *domibus.* In a writ of ward *De cuſtodia terre & heredis*, and count of the Mannor of *D.* and 15 Acres of Land, which in truth are parcel of the Mannor, and pleaded by the Defendant in abatement of the writ: hee may abridge his demand of the 15 Acres. In treſpaſs *de bonis & catallis captis*, and count of money taken away (for which this form will not ſerve, the money muſt needs bee expreſſed in the writ) hee may abridge the count touching that.

14 *Aſſ. Pl.* 9.
4 *E.* 4. 33.
14 *H* 6. 4.
10 *El. Dy.* 272.
39 *E.* 3. 10.
29 *E.* 3. 30.
Br. abridgm. 111

Sta-

Statutes.

21 H. 8. cap. 3. The demand of a thing entire may bee abridged before verdict, though thereby the Writ become false. After acquittall upon an appeal or Indictment of Felony or Treason, he shall never be drawn in question for the same Fact again. Therefore upon an Indictment of Man-slaughter or Murder, the Justices (by discretion) were wont not to proceed to arraignment till the year and the day were past, for otherwise if he should bee acquit upon his arraignment, the parties appeal were lost.

22 E. 4. Coro. 44

CHAP. 37.

Of Trial by Battail.

In (a) writs of right, and in appeals (b) that touch life, trial may be by Battail at the Defendants choice. Therefore (c) the Demandant in a Writ of right, had need alwayes to have his Champion ready, else hee may happen to bee deceived.

The battail in a writ of right must bee all by Champions. Therefore in a Writ of right an Infant may joyn the *Mise* and try it by battail. So can hee not in an appeal, for there it must be done in proper person:

(a) *Old Na. Br.* 1

(b) *See the manner of waging battail & performing it.* 9 H. 4. 3. *in an appeal of robbery.* 17 E. 3. 2. *in an appeal of murder.*

(c) *Old N. B.* 10. 9 E. 4. 35.

(a) Br. Chal. 196 which Champions must be (a) freemen, not villeins, and (b) so is the issue taken that he is ready to defend it by the body of J. S. a Freeman. Therefore (c) for the Lord to offer his villein for his Champion in a Writ of right, or in an appeal, is a manumission of him. And the Demandants champion must have seisin given him of his Freehold in possession, and thereof take his oath.

(b) 3 H. 6. 55.
(c) Bracton.
Westm. 1. cap. 40. so reciteth it.

Statutes.

Westm. 1. cap. 40. Touching the Oaths of the Champions it is thus provided, because it seldome happened, but that the Champion of the Demandant is forsworn, in that hee sweareth that hee or his Father saw the seisin of the land or his Ancestor. And that his Father commanded him to declare the right, that from henceforth the Champion of the Demandant shall not bee compelled so to swear.

The battail in an appeal must be in proper person. And therefore there the Defendant is restrained from the choice of battail, and must needs try it by Jury. If there be any notorious presumption of the fact in him, as that he brake prison, or escaped by flight being led towards prison for it, or was (b) endicted for it. So in an appeal of Murder, that hee was taken in the act with a (c) bloody knife, in an appeal of Robbery, that upon fresh sute and hue and cry hee was taken with the manner, having

9 E. 4. 35.
3 Ass. Pl. 6.
(b) 22 E. 4. 19.
(c) 6 H. 3. Corone. 411.

having some of the money about him, or be of 22 E.4. 29.
infirmity in the plaintiff, as if hee bee maymed, or within age, &c.

But against a Peer of the Realm bringing an appeal, the Defendant shall not wage battail, much less against the King, either upon an endictment or appeal. Discourse of the Cust. of London, fol. 13. Staw. 108.

6 Edw. 2. cap. 6. Ousteth battail in an appeal of rape.

CHAP. 38.

Of Trial by witness.

If a writ of dower bee taken upon the death of her husband shall be tried by witnesses. So shall no other case in the Law. 8 H. 6. 23.

CHAP. 39.

Of Trial by wager of Law.

In some cases also the trial shall bee by the Defendants oath, which wee call waging of his Law. As where the Tenant in a *precipe quod reddat* alledgeth that he was not lawfully summoned according to the Law of the land. In mere personal contracts, wee call them simple contracts, as (a) debts for money lent, or 22 H. 6. 41. (a) 1 H. 6. 1.

rent upon a leaſe for years of a ſtock of ſheep, or ſuch like: (but (c) not upon a leaſe of land. And though it be of land ſtored with beaſts, yet the Defendant ſhall not wage his Law for the Rent due for the beaſts, for it is all but one entire contract) detinue of a horſe, or other perſonal thing: but not of a deed indented, or obligation, or of a leaſe for years of land, nor in an action upon the caſe, for it is not by reaſon of any contract **growing without deed**, for in debt upon ſale of a horſe for 10l. if the plaintiff have a ſpecialty of it, hee ſhall eſtop the Defendant to wage his Law. But upon detinue and count of a baylement by deed, yet the Defendant may wage his Law, for detinue is the cauſe of the action, which may be diſcharged by matter *en fait*, as the Defendants redelivery, or the Plaintiffs taking of it back again, &c. **Or privity of others**, for in detinue upon a baylment by another mans hand, the Defendant may wage his Law, becauſe he is not to anſwer to the baylment, but to the detinue. So in debt upon a Contract by another mans hand: But not in accompt upon receit by another mans hand, for there hee muſt anſwer to the receit; **the defendant may wage his Law. Therefore in ſuch kinde of actions Executors are not chargeable, as** in debt upon ſale of goods to the Teſtator, and (b) though the party have a tail enſealed of it, for that is no ſpecialty: or for (c) wages due by the Teſtator upon a retainer. Otherwiſe it is in ſuch

(c) 9 E. 4. 1.

34 H. 8. Br. leygager 97.
18 E. 4. 23.
39 H. 6. 35.
27 H. 8. 22.

18 H. 8. 3.

15 E. 4. 25.

(b) 25 E. 3. 40.

(c) 11 H. 6. 48.

such an action brought by a Labourer (who is bound by Statute to serve) in (*d*) debt upon arrearages of an account made by the Testator before Auditors (who are Judges of record) or (*e*) upon a lease for years, though it bee made without deed, for in none of these cases the testator could wage his Law.

(*d*) 10 *H.6. Execut.* 21.

(*e*) *Br. Execu.* 33

Prerogative.

No wager of Law shall be against the King. Therefore in an attatchment upon a prohibition the party shall not wage his law that hee did sue forward contrary to the Kings prohibition, for the King is *quodammodo* party of the contempt. And for this cause also, debt upon a simple contract shall not beforfeit to the King by out-lawry, for then the party were in worse case than before, where hee might have waged his Law.

24 *E.* 3. 39.
18 *E.* 3. 4.
50 *E.* 3. 5.

Statutes.

Magn. chart. cap. 28. Wager of Law shall not bee admitted without credible witnesses.

5 **H.** 4. **cap.** 8. In actions of debt upon the arrearages of an accompt fayling to the intent (to put the Defendants from their law) that the same was found before their Apprentices or servants Auditors assigned in, shall bee in the Judges discretion upon examination

rent upon a leaſe for years of a ſtock of ſheep, or ſuch like: (but (c) not upon a leaſe of land. And though it be of land ſtored with beaſts, yet the Defendant ſhall not wage his Law for the Rent due for the beaſts, for it is all but one entire contract) detinue of a horſe, or other perſonal thing: but not of a deed indented, or obligation, or of a leaſe for years of land, nor in an action upon the caſe, for it is not by reaſon of any contract **growing without deed**, for in debt upon ſale of a horſe for 10l. if the plaintiff have a ſpecialty of it, hee ſhall eſtop the Defendant to wage his Law. But upon detinue and count of a baylement by deed, yet the Defendant may wage his Law, for detinue is the cauſe of the action, which may be diſcharged by matter *en fait*, as the Defendants redelivery, or the Plaintiffs taking of it back again, &c. **Or privity of others**, for in detinue upon a baylment by another mans hand, the Defendant may wage his Law, becauſe he is not to anſwer to the baylment, but to the detinue. So in debt upon a Contract by another mans hand: But not in accompt upon receit by another mans hand, for there hee muſt anſwer to the receit: **the defendant may wage his Law. Therefore in ſuch kinde of actions Executors are not chargeable, as** in debt upon ſale of goods to the Teſtator, and (b) though the party have a tail enſealed of it, for that is no ſpecialty: or for (c) wages due by the Teſtator upon a retainer. Otherwiſe it is in ſuch

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mination of the Attornies, or whom elſe they pleaſe to receive, or ouſt the defendants of their Law.

32 H.7.18. 3. **In plaints in Court Barons for perſonal things under 40 s.** yet (by preſcription) it may bee by Jury: which is againſt the common courſe and order of it.

CHAP. 40.

Of Demurrers.

7 E. 6. Pl. 85. A **Demurr in the Law** which we call a demurrer, **is when admitting the matters alledged either of them reſtes in the iudgement of the Law.** The form of joyning a demurrer is, *Et prad. quer' dicit quod placitum prad. definimus ſufficiens in lege exiſtit ad ipſum*, the Plaintiff, *ab actione ſua prad. &c. praeciuden. quodque ipſe ad placitum illud modo & forma placitatum neceſſe non habet, nec per legem terre tenetur reſpondere, unde pro defectu ſufficient. reſponcionis petit Judicium, &c. Et prad. Def. ex quo ipſe ſufficient. mater in lege ad prad. quer' ab actione ſua prad. verſus eum habend. praecludend. ſuperius allegavit quam ipſe paratus eſt verificare, quam quidem mater prad. quer' non dedicit, nec ad eam equaliter reſpondet, ſed verificationem illam admittere recuſat petit judicium: & quod prad. quer' ab actione ſua prad. verſus eum habend. praecludatur.*

This

This being joyned upon an exception to the original it self, or count for some fault appearing in it, doth onely give the defendant to make a better answer, which we call a *respondes ouster*, if it pass against him. 50 E. 3. 20.

Chap. 41.

Of Appearance.

Thus far concerning pleading.

The other mean acts are Appearance, and Continuance, or Judicial proceis.

Appearance is the parties coming into the Court. Whereupon (*a*) Common day given the fourth day after the very day is allowed, and so are all entries, *obtulit se quarto die post*. But so is it not upon a certain day given unto him, as Monday, Tuesday, or such like. (*a*) 12 H. 4. 24. 1 H. 6. 4. F. N. B. 25. *a*. 1 H. 6. *ibid.*

When the party for not appearing should have some great loss or corporate pain, as to have a Charter of pardon allowed where one before was out-lawed at his suit, or a *Sequatur sub suo periculo*, when if hee appear not, the land is lost: in a replevin, *sicut pluries*, when a *Capias* in *Withernam* is to go against him, &c. hee may appear though the officers return force him not to it, as if in the two first cases hee return a 48 E. 3. 1. 7 E. 4. 15. 8 H. 6. *ibid.* 3 H. 6. 14.

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